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PACE, the Suburban Bus Division)
of the Regional Transportation Authority,)
))
Complainant,)
))
v.)
))
COMMONWEALTH EDISON COMPANY,)
))
Respondent.)

Docket No. 00-0280

**PACE'S RESPONSE TO COMMONWEALTH EDISON COMPANY'S
MOTION TO DISMISS PORTIONS OF PACE'S COMPLAINT**

Now comes Pace, the Suburban Bus Division of the Regional Transportation Authority (hereinafter referred to as "Pace") by and through its Attorney, Ellen L. Champagne, as its response to Commonwealth Edison's (hereinafter referred to as "ComEd") Motion to Dismiss Portions of Pace's Complaint as being time barred pursuant to §9-252 of the Public Utilities Act, 220 ILCS 5/9-252, submits the following memorandum of law and states as follows:

A. Introduction.

Pace, the Suburban Bus Division of the Regional Transportation Authority, was established by statute as a body politic, political subdivision and municipal corporation. 70 ILCS 3615/1.04, 70 ILCS 3615/3A.01. All property of the Regional Transportation Authority and its Service Boards is declared by statute to be public property devoted to an essential public and governmental function and purpose. 70 ILCS 3614/4.08.

Pace filed a Complaint against ComEd on April 7, 2000, wherein it alleged in Count III that Respondent, ComEd, charged the "wrong rates" for its service to Pace West Division located in Melrose Park, Illinois and that ComEd has failed and refused to correct its error. (See Complaint ¶15

and ¶16, attached hereto as Exhibit A.) Pace alleges that when it became aware of the application of the wrong rate, it notified ComEd in a letter dated April 9, 1998. (See Complaint ¶15 and letter attached thereto as Exhibit 2.)

ComEd claims in its Motion to Dismiss that Pace is time barred from claiming a refund for services prior to April 7, 1998, pursuant to the two year statute of limitations contained in §9-252 of the Public Utilities Act. 220 ILCS 5/9-252.

B. Applicable Law and Argument.

1. The appropriate statute is two years from discovery or knowledge as found in §9-252.1 of the Public Utilities Act.

While Respondent is correct that the statute of limitations in §9-252 is two years from the time the service as to which the complaint was made was furnished or performed, Respondent's reliance on this section is misplaced. In pertinent part, that section provides as follows:

When complaint is made to the Commission concerning any rate or other charge of any public utility and the Commission finds that the public utility has charged an excessive or unjustly discriminatory amount for its product, commodity or service, the Commission may order that the public utility make due reparation to the complainant therefor, with interest at the legal rate from the date of payment of such excessive or unjustly discriminatory amount. 220 ILCS 5/9-252.

Pace's claim is that it was overcharged due to an incorrect rate and requests a refund with interest for said error. This claim fits more squarely into the following section of the Public Utilities Act which has a two year statute of limitations "from date when the customer first has knowledge of the incorrect billing":

5/9-252.1. Refunds for overcharges

When a customer pays a bill as submitted by a public utility and the billing is later found to be incorrect due to an error either in charging more than the published rate or in measuring the quantity or volume of service provided,

the utility shall refund the overcharge with interest from the date of the overpayment at the legal rate or at a rate prescribed by rule of the Commission. Refunds and interest for such overcharges may be paid by the utility without the need for a hearing and order of the Commission. Any complaint relating to an incorrect billing must be filed with the Commission no more than 2 years after the customer first has knowledge of the incorrect billing. 220 ILCS 5/9-252.1.

In its verified Complaint, Pace alleges that it first became aware of the incorrect billing on April 9, 1998, when it sent notice of same to ComEd. (Complaint ¶14, Exhibit A attached hereto.) Since Pace filed its Complaint within two years from when it first had knowledge of the error, Pace's Complaint has been timely filed.

2. Alternatively, since this action involves breach of a written service contract, the applicable statute of limitations is ten (10) years.

In 1985, Pace contracted with ComEd for the Melrose Park facility to be placed at rate 6 pursuant to and subject to a service contract. (See correspondence from Pace architects and engineers with attached correspondence from ComEd, attached hereto as Exhibit B.) ComEd continuously breached its service contract with Pace by charging rates of 6T and 6TE up to July, 1998. Since the statute of limitations for written contracts is ten (10) years from when the breach occurred, Pace is entitled to recover for incorrect billings that occurred from April 7, 1990 and subsequent thereto. 735 ILCS 5/13-206.

3. Pace, as a municipal corporation, is not subject to statutes of limitations cited herein since it is entitled to common law governmental immunity.

However, even if the Commission finds that Section 9-252 or any statute of limitations is applicable to this dispute, Pace, as a "unit of local government, body politic, political subdivision and municipal corporation" is entitled to common law immunity from the statute of limitations. 70 ILCS 3615/1.04, 70 ILCS 3615/3A.01. Dating back to the nineteenth century, Illinois law has held

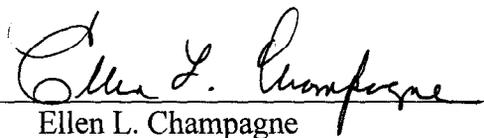
that governmental entities are immune from the statute of limitations in actions involving public rights unless the statute of limitations expressly states that it applies to governmental entities. *People ex rel. Dept of Public Aid v. Dent*, 614 N.E.2d 376, 244 Ill. App. 3d 380, 185 Ill. Dec. 242 (1st Dist. 1993); *People ex rel. Martin v. Schwartz Oil*, 561 N.E.2d 201; 203 Ill. App. 3d 903, 148 Ill. Dec. 895 (5th Dist. 1990); *Board of Educ. of City of Chicago v. A,C and S, Inc.*, 546 N.E.2d 580, 131 Ill. 2d 428, 137 Ill. Dec. 635 (1989); *DuPage County v. Graham, Anderson*, 485 N.E.2d 1076, 109 Ill.2d 143, 92 Ill. Dec. 833 (1985); *People ex rel. Dept. of Transportation v. Molter*, 478 N.E.2d 1102, 133 Ill. App. 3d 164, 88 Ill. Dec. 494 (1st Dist. 1985); *City of Shelbyville v. Shelbyville Restorium, Inc.*, 96 Ill. 2d 457, 71 Ill. Dec. 720 (1983); *Trustees of Schools v. Arnold*, 58 Ill. App. 103 (1894); *City of Alton v. Illinois Transportation Company*, 12 Ill. 38 (1850). Since the statute of limitations relied on by ComEd and any other statutes of limitations referred to herein, do not expressly state that it applies to governmental entities, Pace is entitled to common law immunity. Since the action against ComEd is for recovery of public funds, it is an action that involves public rights.

WHEREFORE, for all of the reasons set forth herein, Pace respectfully moves this Hearing Examiner to deny the Respondents Motion to Dismiss certain portions of Pace's Complaint based on statute of limitations.

Dated: November 27, 2000

Respectfully submitted,

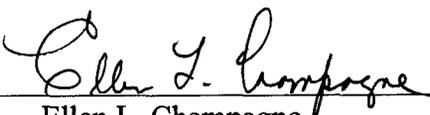
Pace Suburban Bus

By: 
Ellen L. Champagne

Ellen L. Champagne
General Counsel
Pace Suburban Bus
550 West Algonquin Road
Arlington Heights, IL 60005
(847)228-2367

Proof of Service

I, Ellen L. Champagne, attorney, certifies that she served a true and correct copy of Pace's Response to Commonwealth Edison Company's Motion to Dismiss Portions of Pace's Complaint by UPS overnight mail on the 30th day of November, 2000, to the Illinois Commerce Commission and to Hopkins and Sutter, Robert Feldmeier.



Ellen L. Champagne

Kane, Lake, McHenry and Will and the suburban areas of Cook County outside of areas served by the Chicago Transit Authority.

3. Pace operates its public transportation services from ten garage divisions and numerous ancillary facilities which Pace owns, including but not limited to various public transportation facilities, Park-n-Ride commuter parking lots, and bus shelters. A complete listing of all facilities which Pace presently owns from which Pace operates its public transportation facilities is attached hereto as *Exhibit 1*.

4. Commonwealth Edison Company is an electrical utility services corporation regulated by the Illinois Commerce Commission, whose principal address is 227 West Monroe Street, P.O. Box 767, Chicago, Illinois 60690-0767.

5. Since at least as early as April 9, 1998, and continuing to the present, Pace has disputed certain improper charges, taxes and rates applied by Commonwealth Edison to Pace's various electrical services accounts. On February 23, 2000, Pace filed an Informal Complaint with the Illinois Commerce Commission in an effort to resolve Pace's claims in an expeditious manner. As of the date of the filing of this Complaint, Pace had received no written response from either Commonwealth Edison Company or the Illinois Commerce Commission to its Informal Complaint.

COUNT 1

6. Article 2 of the Electricity Excise Tax Law (35 ILCS 640) has been in effect since August 1, 1998. Section 2-4 of the Electricity Excise Tax Law states in part: "*a tax is imposed on the privilege of using in this State electricity purchased for use or consumption and not for resale, other than by municipal corporations owning and operating a local transportation system for public service...*" (emphasis added).

7. Prior to the effective date of the Electricity Excise Tax Law, Section 2 of the Public Utilities Revenue Act (35 ILCS 620/2), provided in part: "*A tax is imposed upon persons engaged in this State in the business of distributing, supplying, furnishing or selling electricity to persons other than municipal corporations owning and operating a local transportation system for public service in this State...*" (emphasis added).

8. As a municipal corporation owning and operating a local transportation system for public service, Pace is exempt from imposition of the Electricity Excise Tax Law and was exempt from imposition of the Public Utilities Revenue Act when it was in effect.

9. Despite Pace's clear exempt status from either the Electricity Excise Tax Law or the Public Utilities Revenue Act, Commonwealth Edison Company improperly assessed state electricity taxes on numerous Pace accounts.

WHEREFORE, Pace requests a ruling by the Illinois Commerce Commission that Pace is exempt from the Electricity Excise Tax Law and that Pace was exempt from the Public Utilities Revenue Act during the time the latter statute was in effect; and further requests the Illinois Commerce Commission to direct Commonwealth Edison to refund to Pace all improperly-charged state and regulatory taxes with interest.

COUNT 2

10. Section 4.03 of the Regional Transportation Authority Act (70 ILCS 3615/4.03) states in part: "*The Authority and the Service Boards shall be exempt from all State and unit of local government taxes and registration and license fees other than as required for motor vehicle registration in accordance with the Illinois Vehicle Code, as now or hereafter amended. All property of the Authority and the Service Boards is declared to public property devoted to an essential public and governmental function and purpose and shall be exempt from all taxes and special assessments of*

the State, any subdivision thereof, or any unit of local government.” (emphasis added).

11. Section 4.03 of the Regional Transportation Authority Act operates to exempt Pace from all local governmental fees, taxes and other charges, including all municipal electricity taxes or municipal franchise fees.

12. Despite this exemption, Commonwealth Edison has improperly charged Pace municipal electrical taxes and franchise fees.

WHEREFORE, Pace requests a ruling by the Illinois Commerce Commission that Pace is exempt from all municipal electrical fees, taxes, charges and franchise costs. Pace further requests the Illinois Commerce Commission to direct Commonwealth Edison Company to refund all improperly-assessed municipal electrical fees, taxes, charges and franchise costs, to Pace, with interest.

COUNT 3

13. Until August 1995, Commonwealth Edison Company, without Pace’s knowledge or consent, placed one of Pace’s garage divisions (West Division located at 3500 West Lake Street in Melrose Park; Commonwealth Edison Account No. 02720-25000) on Rate 6T. In August, 1995, again without Pace’s knowledge or consent, Commonwealth Edison Company placed West Division on Rate 6TE.

14. The applicable and most economical rate for Pace’s West Division was Rate 6, which should have been the rate imposed by Commonwealth Edison Company.

15. When Pace became aware of the application of the wrong rates, Pace informed Commonwealth Edison Company to correct the rates immediately to Rate 6. This notice was sent to Commonwealth Edison by letter dated April 9, 1998, a copy of which is attached hereto as *Exhibit 2*.

16. Commonwealth Edison Company did not correct the rate for Pace West Division until August, 1998.

WHEREFORE, Pace requests the Illinois Commerce Commission to direct Commonwealth Edison Company to refund all improper charges for Rate 6T and Rate 6TE for Pace's West Division with interest.

COUNT 4

17. For service since May 16, 1999, Commonwealth Edison has not provided actual meter readings for one of Pace's divisions (Northwest Division located at 900 E. Northwest Highway in Des Plaines; account no's. 46384-60003 and 21471-68001).

18. Pace has repeatedly requested actual meter readings to support the invoices from Commonwealth Edison Company for service at Pace's Northwest Division.

19. Pursuant to regulations of the Illinois Commerce Commission (*83 Illinois Administrative Code 280.80*), Pace is entitled to actual meter readings at least every second billing period.

WHEREFORE, Pace requests the Illinois Commerce Commission to direct Commonwealth Edison Company to provide actual meter readings to Pace for electrical service at its Northwest Division.

Respectfully submitted,



Sandra Tristano
Pace General Counsel
Attorney for Pace, the Suburban Bus
Division of the Regional Transportation
Authority
550 West Algonquin Rd.
Arlington Heights, Illinois 60005
(847) 228-2367

VERIFICATION

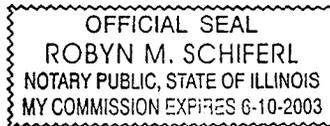
I, Cynthia Pavlick, Offices Services Coordinator for Pace, the Suburban Bus Division of the Regional Transportation Authority, do hereby verify that I have read the foregoing Complaint filed by Pace, and that the statements therein are true, correct and complete to the best of my knowledge and belief; and if called I would so testify.

Cynthia Pavlick
Cynthia Pavlick

4/7/2000
Date

SUBSCRIBED and SWORN to
before this 7th day of April, 2000.

Robyn M. Schiferl
Notary Public



PROOF OF SERVICE

I, Sandra Tristano, an attorney representing Pace, the Suburban Bus Division of the Regional Transportation Authority, do hereby certify that I served the foregoing Complaint, in its original certified form, together with three copies, on the Illinois Commerce Commission at the address set forth below, by deposit in the United States Mail for overnight mail service on April 7th, 2000:

Office of the Chief Clerk
Illinois Commerce Commission
527 East Capitol Avenue
Springfield, Illinois 62706



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Attorney for Pace, the Suburban Bus
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